NO. 3544

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

AL WEATHERS,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error

ANSWER BY DEFENDANT IN ERROR TO PETITION FOR A REHEARING.

JAMES A. SMISER,
United States Attorney,
Juneau, Alaska,
Attorney for Defendant in Error

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To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Plaintiff in error comes now in his petition for a rehearing in this court and for the first time in this record raises the point that the *corpus delicti*

and the connection of the defendant therewith has not been proven.

This of course is purely a question of fact depending alone upon the evidence in the record. Had plaintiff in error relied upon this defense it was incumbent upon him to have made a motion for a directed verdict in the court below, upon the conclusion of the introduction of evidence. But he totally failed to make any such defense by motion for a directed verdict, either at the conclusion of the States evidence,

See Transcript p. 287,

or upon the conclusion of the entire evidence for both sides.

See transcript p. 358.

At the conclusion of the evidence in chief for the Government he made a motion to strike out certain evidence which had been presented by the Government.

See Transcript pp. 287-288.

But he made no such claim as he now presents to the Court. He did, of course, contend on the trial below that he was not guilty and as a defense introduced certain witnesses to prove an alibi, but the jury evidently did not believe these witnesses. It may be that counsel in his oral argu-

ment contended that the case had not been proved, but as the record is silent as to this we cannot speculate. But however this may be, the facts are that the entire question involving *corpus delicti* and the defendant's connection therewith were submitted to the jury and decided adversely to defendant—plaintiff in error. Had he, at the time of the trial below, believed that the *corpus delicti* and defendant's connection therewith had not been shown by the evidence, he should have made a motion for a directed verdict. Having failed to do this and having submitted these questions to the jury, he cannot now complain. Furtherfore, there is no assignment of error raising this point. It is therefore not now before the Court.

See Holsman vs. U. S. 248 Fed. 193-198.

It has been universally held by this court that a failure to make and rely upon a motion for a directed verdict at the end of the evidence constitutes a waiver of such defense. Among other recent decisions of this Court, His Honor Judge Gilbert rendering the opinion in the case of *Clark vs. U. S.* held as follows:

> *"Defendant's motion, at the conclusion of the prosecution's evidence, to dismiss, was waived by introduction of evidence on his behalf, and by his failure to move for an instructed verdict at the close of the evidence."*

Clark vs. United States, 245 Fed. 112-114.

Assignments of error, not set out in plaintiff in error's brief as required by Rule 24 (150 Fed. XXXIII, 79 C. C. A. XXXIII), cannot be considered.

Harris vs. United States, 249 Fed. 41-42,

Dextrell vs. True, 74 Fed. 12-14.

Failure to renew motion for directed verdict at close of evidence waives objection.

Prosser vs. United States, 265 Fed. 252-253.

Alleged errors disclosed in defendant's briefs, but not included in assignment of errors, need not be considered.

Holsman vs. United States, 248 Fed. 193-198.

Insufficiency of evidence cannot be considered by the Court:

First, because not properly raised by motion for directed verdict after all the evidence.

Second, it is not the province of the Court to pass upon the weight or sufficiency of the evidence.

Hale vs. United States, 242 Fed. 891-893,

Village of Alexandria vs. Stabler, 50 Fed. 689,

Pac. Mut. Life Insc Co. vs. Snowden, 58 Fed. 642-7,

Simpson vs. United States, 184 Fed. 817-820,

Burton vs. United States, 142 Fed. 57-59,

Hansen vs. Boyd, 161 U. S. 397-402.

The jury's findings of fact are binding upon the Circuit Court of Appeals when there is any evidence to support them.

Oppenheim vs. United States, 241 Fed. 625-627 Sec. 2,

Dean vs. United States, 246 Fed. 568-572.

In his petition for a rehearing on page three, ecounsel for plaintiff in error contends that the question was raised in the tenth assignment of error, which is as follows: "The Court erred in pronouncing sentence and judgment against the defendant."

See Transcript p. 397.

This proposition we deny. When we look to the assignments of error we find that this, the tenth assignment, is the last assignment made. It is general in its terms and means nothing except as construed with the other assignments which had preceded it. It says the Court erred "in pronouncing judgment." But why? The only logical conclusion is that it erred because of the admission of the testimony complained of in the first nine assignments of error, or some of them. It

certainly could not refer to any new and unthought-of matter which might thereafter arise in the mind of counsel, but which was never presented to the trial Court.

An assignment of error must be based upon the record and the conclusions which are drawn from the record. But even were we to concede that the tenth assignment did fairly raise the point as now contended, still that would not avail anything. It is too late when we come to assignment of errors to, for the first time, raise a question as to the sufficiency of evidence. This must be done at the proper time and place, viz. in the trial court at the conclusion of the evidence. Unless made then and there, it is waived, as shown by all the authorities above cited.

It is the province of the Appellate Court to review the rulings of the *trial* Court on questions actually brought to the attention of *that court* and decided by it. An assignment of error that the verdict of a jury is contrary to the evidence goes for nothing, unless the beaten party asked for a peremptory instruction for a verdict in his favor at the close of all the evidence and duly excepted to a refusal to give such instruction.

Dextrell vs. True, 74 Fed. 13-14.

Again, this Court has held as follows:

"The principal error relied upon and chiefly discussed is the insufficiency of the evidence to support the verdict of the jury. We cannot review the sufficiency of the evidence, for the reason that this court can only review errors of law committed by the trial court, and no request for an instructed verdict was made after all of the evidence had been introduced. To enable this court to review the sufficiency of the evidence in an action at law, the complaining party must, after all the evidence has been introduced request the trial court to direct a verdict. The refusal of the trial court to grant such request presents a ruling the correctness of which may be reviewed in the appellate court. In the absence of such request, no action of the trial court in that respect is presented."

Simpson vs. United States, 184 Fed. 817, 820.

This same doctrine is announced in

Bernal vs. United States, 241 Fed. 339, 341,

Cooper vs. United States, 247 Fed. 45-47 (3-5).

But notwithstanding all that has above been said, had plaintiff in error done what he failed to do and have made such a motion at the conclusion of the evidence, it could have availed him nothing.

The proof in the record was abundant to warrant the jury in its findings and no court with due regard to the law could have ordered a directed

verdict. It is undisputed in the testimony that defendant was the owner and master of the boat The Diana. That he plied the same for several months in the waters of southeastern Alaska and especially in the vicinity of Admiralty Cove where the assault was committed. That this same boat had visited and robbed the fish traps situated at Admiralty Cove on a number of occasions during the summer of 1919 and immediately prior to July 8, 1919, to-wit, on June 5th, June 17th, June 29th, and July 5th, 1919. On July 8th, 1919, at the time of the assault, a man of the same appearance and description as defendant was on the deck of the boat Diana.

See Transcript, p. 127.

Testimony as to what occurred at Admiralty Cove on June 5th, June 17th, June 29th, and July 5th and as to what occurred at Strawberry Point on June 30th, 1919 and at Ground Hog Bay on July 7th, 1919 and in the latter part of June or first of July, 1919.

See Transcript pp. 241 and 242,
(when Al Weathers was clearly identified,)

was all competent to prove identity of defendant, to prove intent, to prove a common scheme, system, etc., as has been directly held by your Honors' opinion now on file in this case. This is an in-

variable rule sustained by innumerable decisions. We cite the following:

Evidence of other crimes to show identity, system, etc.—

People vs. McGilver, Cal. (20069) 7 Pac. 49,

State vs. Kepper, (Iowa) 23 N. W. 304-307,

State vs. Harris, (Iowa) 133 N. W. 1078-1080,

Moffatt vs. United States, 232 Fed. 522,

Deason vs. United States, 254 Fed. 259,

Byron vs. United States, 259 Fed. 371,

Riddell vs. United States, 244 Fed. 695,

People etc. vs. Louis Thau, 219 N. Y. 39, 113 N. E. 556 Reported in 3 A. L. R. 1537-1540-1545-1556,

R. C. L. Vol. 8, p. 201, sec. 196,

R. C. L. Vol. 10, p. 939, sec. 107-109.

Corpus Juris, Vol. 16, p. 588, sec. 1135, p. 856 sec. 2157.

We also cite other authorities cited in defendant in error's original brief on file in this cause, and insist that the petition for rehearing should be denied,

Respectfully submitted,

JAMES A. SMISER,
United States Attorney,
Counsel for Defendant in Error.